

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

DEC 13 2007

COURT OF APPEALS
DIVISION TWO

EQUIFUNDING MICHIGAN INC., a)	
foreign corporation,)	2 CA-CV 2007-0077
)	DEPARTMENT B
Plaintiff/Appellant,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 28, Rules of Civil
BETH FORD, Treasurer of Pima County,)	Appellate Procedure
)	
Defendant/Appellee,)	
)	
ROGER PUTZI and ANGELA PUTZI,)	
husband and wife,)	
)	
Intervenors/Appellees.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20065052

Honorable Michael O. Miller, Judge

AFFIRMED

Dennis M. Breen, III	Tucson
	Attorney for Plaintiff/Appellant

Barbara A. LaWall, Pima County Attorney	
By Terri A. Roberts and German Yusuf	Tucson
	Attorneys for Defendant/Appellee Ford

Norris L. Ganson, Esq.	Tucson
	Attorney for Intervenors/Appellees

E S P I N O S A, Judge.

Factual and Procedural Background

¶1 The essential facts of this case are undisputed. In February 2000, plaintiff/appellant Equifunding Michigan Inc. (EMI) purchased a tax lien against real property owned by defendant Ryan Rasey as trustee of the 213 Trust. In June 2006, EMI mailed a letter to Rasey at the address of the property in question to notify him it intended to foreclose the right to redeem pursuant to former A.R.S. § 42-18201. The letter was unclaimed and returned to EMI. In September, EMI filed an action to foreclose and named Rasey, the 213 Trust, and Pima County Treasurer Beth Ford as defendants.

¶2 Rasey was served with the complaint on September 24. The next day, intervenors/appellees Roger and Angela Putzi went to the Pima County Treasurer's office to redeem the tax lien.¹ They presented documents showing the beneficiary of the 213 Trust was another trust called President Trust, Rasey was trustee of both trusts, and the Putzis were beneficiaries of the President Trust. The Treasurer concluded the Putzis were authorized under A.R.S. § 42-18151 to redeem the tax lien, and the Putzis paid the delinquent taxes, accrued interest, and other fees and received a certificate of redemption. The Treasurer then notified the superior court that the tax lien had been redeemed.

¹Rasey was served with the complaint at his home address, which EMI had asserted they had obtained in August through a record search. The record on appeal indicates that Rasey contacted the Putzis immediately after being served.

¶3 EMI, unaware the lien had been redeemed, applied in November to have Rasey and the 213 Trust defaulted for failure to answer or otherwise defend the action, and default was entered. EMI's counsel then received a letter from the Putzis' counsel informing him the lien had been redeemed and demanding the action be dismissed. EMI's counsel replied that the Putzis were not one of the parties authorized by statute to redeem and added that, if the Putzis had redeemed on behalf of Rasey or the 213 Trust, EMI was entitled to reimbursement of its costs and attorney fees.

¶4 In December, EMI moved for entry of default judgment. The Putzis moved to intervene in the action and claimed that, as the ultimate beneficiaries of the 213 Trust, they had an interest in the property and were entitled to redeem. The Pima County Treasurer filed a separate opposition to EMI's motion for default judgment that asserted the Putzis had an equitable interest in the property and had properly redeemed the tax lien.

¶5 A hearing was held on both motions in March 2007. In April, the court denied EMI's motion for default judgment and granted the Putzis' motion to intervene. The court found the Putzis, as beneficiaries of the President Trust, the beneficiary of the 213 Trust, "had an equitable claim under A.R.S. § 42-18151 that authorized them to redeem." EMI appeals from the court's order.²

²The trial court's order denying the motion for entry of default judgment and permitting the Putzis to redeem the tax lien disposed of EMI's action, and it is therefore an appealable order. *See* A.R.S. § 12-2101(D).

Legal or Equitable Claim

¶6 Whether the Putzis had a legal or equitable claim in the property that entitled them to redeem the tax lien under Arizona’s tax lien foreclosure laws is dispositive of this appeal. Section 42-18151(A)(3) provides that a tax lien may be redeemed by “[a]ny person who has a legal or equitable claim in the property.” Because this is a question of statutory interpretation, we review the issue *de novo*. See *Grynberg v. Shaffer*, 216 Ariz. 256, ¶ 5, 165 P.3d 234, 235 (App. 2007).

a. Publicly Recorded Interest

¶7 EMI first contends the Putzis’ interest in the property was “too remote” to constitute a “legal or equitable claim” under § 42-18151(A)(1) because the 213 Trust and the President Trust were not publicly recorded and the Putzis’ interest in the trusts could not have been detected through a diligent search of public records. EMI maintains that permitting a party like the Putzis to redeem would have a “chilling effect” on tax lien purchasers, who “would be loathe to invest time and money in a procedure that could be thwarted by those who have chosen to hide themselves from public view.”³

¶8 EMI appears to be correct that the public records did not reveal the Putzis’ interest in the trusts. The property deed shows the property was conveyed to the 213 Trust

³At oral argument, counsel for EMI also suggested that the President Trust was an invalid trust because it did not contain a trust res. However, as counsel for the Putzis pointed out, the President Trust held the beneficial interest of the 213 Trust. See Restatement (Second) of Trusts § 83 (1959) (equitable interest in land may be held in trust).

and Ryan Rasey as trustee, but it does not mention the trust beneficiaries. And records from the Treasurer's office list the property owner as Rasey, but they also make no mention of the Putzis.

¶9 However, to the extent EMI contends the Putzis were not entitled to redeem because their interest was not demonstrated in the public records, we reject that argument. Section 42-18151 does not limit the right to redeem to those persons whose interest in property is publicly recorded. Rather, it provides that a tax lien may be redeemed by “*any person* who has a legal or equitable claim in the property.” § 42-18151(A)(3) (emphasis added). And we note that, although EMI chose one of the two acceptable methods under § 42-18202 to notify interested parties of its intent to foreclose, it chose the method least likely to notify the undisclosed beneficiaries of the 213 Trust. That is, EMI mailed a notice to the address of the property, as provided by § 42-18202(A)(1)(a-c),⁴ but it did not investigate the records of the county recorder, a necessary step if it had chosen to give notice as provided by the method articulated in the first clause of § 42-18202(A)(1). Because a tax lien may be redeemed at any time prior to entry of judgment in favor of the lien purchaser, *see* § 42-18206, EMI cannot rightfully claim surprise when an interested party redeems prior to judgment after the lien purchaser has chosen the least informative method of notification

⁴It is questionable whether EMI in fact properly notified Rasey under § 42-18202(A)(1) because the notice of its intent to foreclose was addressed to Rasey personally and to “Rasey Ryan Trust” rather than to Rasey as trustee of the 213 Trust. *See* A.R.S. § 42-18202(A)(1).

permitted by statute. As the Treasurer points out, “[p]urchasing a tax lien entails risk and the onus is on the purchaser to protect its own interests.” *PLM Tax Cert. Prog. 1991-92, L.P. v. Schweikert*, 216 Ariz. 47, ¶ 23, 162 P.3d 1267, 1271 (App. 2007). We therefore conclude that the Putzis’ unrecorded interest did not preclude their right to redeem under § 42-18151.

b. The Terms of the 213 Trust

¶10 EMI next claims the Putzis were not entitled to redeem under § 42-18151(A)(3) because, under the express terms of the 213 Trust, the trust beneficiaries do not have a legal or equitable claim in the trust property. Specifically, EMI points to language in the 213 Trust agreement that provides: “No beneficiary shall have any legal or equitable right, title, or interest, as realty, in or to any real estate held in trust.” Appellees respond that the Putzis, by virtue of their beneficial interest in the President Trust, have an equitable claim in the trust property that entitled them to redeem notwithstanding the trust language.

¶11 Generally, the beneficiary of a trust is vested with equitable title to the trust property while the trustee is vested with legal title. *See Dunlap Investors Ltd. v. Hogan*, 133 Ariz. 130, 132, 650 P.2d 432, 434 (1982); 76 Am. Jur. 2d *Trusts* §§ 258 and 259 (2005). This separation of title is the essence of a trust. *See* 76 Am. Jur. 2d *Trusts* § 1. Thus, the beneficiary of a trust that holds real property normally has an “equitable claim in the property” that authorizes him or her to redeem a tax lien against the property. § 42-18151(A)(3); *see also* 76 Am. Jur. 2d *Trusts* § 1; Restatement (First) of Trusts § 130(b) (1935).

¶12 Here, the above quoted language of the 213 Trust purports to divest the Putzis of any equitable interest in the trust property.⁵ However, section two of the trust agreement also provides that the trust beneficiaries have the following rights: 1) to “direct the Trustee to convey or otherwise deal with title to the trust property”; 2) to “manage and control said property”; and 3) to “receive the proceeds and avails from the rental, sale, mortgage or other disposition of said property.”

¶13 In determining the nature of a beneficiary’s interest in trust property, we will look to the whole trust agreement rather than an isolated phrase. *See* 76 Am. Jur. 2d *Trusts* § 258 (2005). In this case, it is clear that the 213 Trust, while stating that the beneficiaries do not have an equitable claim in the trust property, in fact grants them a significant interest in the property, including the right to manage and control the property, receive proceeds from any lease, rental, or sale of the property, and direct the trustee in dealing with legal title to the property. We agree with the Treasurer that these rights constitute an “equitable claim in the property” for purposes of § 42-18151. *See* 73 C.J.S. Property § 55, at 67 (equitable title

⁵It should be noted that the 213 Trust appears to be based on what is referred to as the Illinois land trust doctrine, first established in Illinois and subsequently adopted in several other jurisdictions. *See* George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*, § 249, at 260 (rev.2d ed. 1992); 765 Ill. Comp. Stat. 430/1 (2007). Under this doctrine, the trustee is vested with both legal and equitable title to the trust property and the beneficiary retains only a personal property interest. *See Hoxha v. LaSalle Nat. Bank*, 847 N.E.2d 725, 730 (Ill. App. Ct. 2006); *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 607 (7th Cir. 1987); *see also Espevik v. Kaye*, 660 N.E.2d 1309, 1314 (Ill. App. Ct. 1996); 76 Am. Jur. 2d *Trusts* §§ 260 and 269. Because we find the Putzis have an “equitable claim in the property” under § 42-18151, however, we need not determine the applicability of the land trust doctrine here.

is enforceable right to have legal title transferred to the holder of equity); Restatement (Second) of Trusts § 128 cmt. b (beneficiary's right to income from land held in trust constitutes an equitable interest held in fee simple). Moreover, we will look to the substance of documents in addition to their form in determining property rights.⁶ *See generally Kadera v. Superior Court*, 187 Ariz. 557, 564, 931 P.2d 1067, 1074 (App. 1996). Accordingly, we conclude the trial court did not err in permitting the Putzis to intervene and redeem the tax lien.

¶14 Furthermore, the court properly denied EMI its attorney fees and costs because the Putzis were not personally served with EMI's action. *See* § 42-18206. We agree with EMI that such a result may seem inequitable in light of the Putzis' intentional concealment of their interest in the property. However, as Division One of this court has pointed out, § 42-18206 is clear on its face that attorney fees and costs may only be recovered from a person who "has been served personally or by publication in the action." *Willow Creek Leasing, Inc. v. Bartzen*, 154 Ariz. 339, 341, 742 P.2d 840, 842 (App. 1987), *quoting* A.R.S. § 42-454; *see generally Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, ¶ 15, 19 P.3d 1241, 1247 (App. 2001) (equity will not alter those rights established by statute). EMI's argument that a tax lien purchaser should be permitted to recover its attorney fees and costs from persons who have concealed their interest in property may have merit but is "more properly

⁶We also note that Arizona public policy favors redemption. *See generally Harbel Oil Co. v. Steele*, 83 Ariz. 181, 185, 318 P.2d 359, 362 (1957).

made and presented to the legislature for its appropriate consideration.” *Willow Creek*, 154 Ariz. at 342, 742 P.2d at 843.

Disposition

¶15 The trial court’s order denying EMI’s motion for entry of default judgment, and granting the Putzis’ motion to intervene, is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge